CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into Access to and Interaction with the Justice System By People with an Intellectual Disability and Their Families and Carers

Melbourne— 24 October 2011

Members

Mr A. Carbines	Mr R. Northe
Ms J. Garrett	Mrs D. Petrovich
Mr C. Newton-Brown	

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Witnesses

Mr L. Harkin, Disability Services Commissioner,

Ms L. Coulson Barr, Deputy Disability Services Commissioner, and

Ms J. Mazzeo, Senior Legal and Policy Officer, Office of the Disability Services Commissioner.

The CHAIR — Thanks for coming in. My name is Clem Newton-Brown, I'm the Chair of the Law Reform Committee. Jane Garrett is Deputy Chair, Anthony Carbines and Russell Northe. And Donna Petrovich is an apology today. You're probably aware this is an Inquiry which we've been given by Parliament and we're calling for submissions and we will do a report and make recommendations at the conclusion. When you give evidence here you're protected by Parliamentary privilege but not outside the room, so just bear that in mind.

If I could get you to start with your names and your professional address for the purposes of the transcript and then launch into what you've got to tell us.

Mr HARKIN — My name is Laurie Harkin, I'm the Disability Services Commissioner. My address is 570 Bourke Street, Melbourne.

Ms COULSON BARR — My name is Lynne Coulson Barr, I'm the Deputy Commissioner with the Disability Services Commissioner, 570 Bourke Street, Melbourne.

Ms MAZZEO — Jo-Anne Mazzeo, Senior Legal and Policy Officer with the Disability Services Commissioner. The same address, 570 Bourke Street, Melbourne.

The CHAIR — Thanks for the submission you've given us. Would you like to talk us through it.

Mr HARKIN — Sure, and thanks for affording us the opportunity to come and talk to you. The submission that we've made is quite straightforward, I think, but complicated in its character. We noted with interest, having sat in the public gallery, the folk that preceded us and the themes that we point to, are that there tends to be in the justice system, and indeed to the points that lead up to involvement in the justice system, stereotypical assumptions made by others who deal with folk with disabilities. I'm mindful of the Terms of Reference that you have, and will confine my commentary to those issues.

It's the case if we look at the things that we learn from complaints that typically are raised with us are around assaulting persons with a disability. Whether it's true or whether it isn't (that is that the allegations themselves are true or not), it's very difficult for it to be tested well given how the rules of evidence work now and reactions that people might have from the police. There's not a strong and consistent application of these arrangements that exist in a protocol, in our view, between the Office of the Public Advocate and the police; the protocol is reasonably particular. I'm imagining that the Public Advocate may well make some commentary about this themselves. There is not a consistent application of the arrangements that best characterise support for persons with a disability by the engagement of the Independent Third Persons arrangements, again a particular arrangement sponsored by the Public Advocate.

If I can perhaps talk about the circumstances in which matters that might find their way to the justice system emerge. For instance, if somebody is living in a supported residential environment and it's alleged by them that the persons providing support to them have assaulted them in some way — be it physical, sexual or in some other way — often the responses are slow by all of the parties, often the people providing the support whose first responsibility it would be to take the matter forward in support of and in partnership with the person with a cognitive impairment to the police, is slow happening. There is significant variation in the way that these things might be taken forward, sometimes a person that provides the support might accompany the person to the police, they might not well talk the issue through, people are afraid. It's the case that in our view police are moved by the need to think about the likelihood of success of taking a brief of evidence to a court and would be influenced by the prospect of its success or failure, given the law as it's currently before them. I think it can be readily seen by lots of the examples that we have been able to see in our experience that police responses are very variable.

So if the things that I have suggested a moment or two ago aren't happening, like the protocol between the police and the Public Advocate being routinely and uniformly followed, if that's a characteristic — arguably unhelpful — the engagement of the Independent Third Persons as part of the process is not uniformly routinely occurring, again not to the advantage of anybody in particular, and one of the things that's frequently not understood is the trauma that people experience. A person with a disability ordinarily wouldn't feel that flash, and neither would you or I, about the prospect of being assaulted and how you might then feel in yourself about taking something like that forward. It would be our observation that folk with disabilities are less likely to be feeling a sense of inner strength, if you like, to take the matter forward themselves and it's not the characteristic of how they live their lives. If you think about the extent to which they are dependent upon others and if it's the persons that they are feeling and have the reality of living independence with, it's less likely that they're going to want to be taking those folk on in a way that might react, from their perspective, badly for them.

Mr NORTHE — Laurie, can I ask a question, through you, Chair. Is there a model that exists at the moment in the system where this should occur in terms of obviously somebody with an intellectual disability comes before the police, is there a requirement to contact the ITP or is there a model that exists that's not being followed?

Mr HARKIN — There's a protocol that exists that, if uniformly followed, should provide better outcomes than the current set of arrangements often do for folk. That, in our view, is the reality. It's also the case that people with a disability, with a cognitive disability or intellectual disability however described, inadequate effort goes into training, and I would use the term training advisedly, to support them to better understand how they can express their rights. If the effort isn't given to them and the work that we do is both hearing complaints and seeking final resolutions as well as concurrently conducting education around people's rights, not turning people into taking riotous behaviour and the like, but rather being clear about: you've got the right to be treated fairly, you've got the right not to be abused, you've got the right to feel safe, you've got the right not to be whacked across the back of the head when somebody doesn't altogether appreciate what you're doing, and these rights are frequently not the experience of people with intellectual disability. So there are some arrangements that are in place now that ought to give greater confidence to how things might work but I'd contend, because of the lack of uniform application, it doesn't help.

Just as there's an inadequate effort in terms of providing support for people with cognitive impairment around their rights and how they might go about expressing them, I think it would be our view that there's equally a lack in terms of training for police to better understand the folks that come before them. Too many times assumptions are made — you may have seen people in the street yourself and you think perhaps they're intoxicated, they're stumbling about the place as they're trying to make their way about town, when in fact they could be a person with a nonsignificant disability. Sometimes then physical disabilities are incorrectly interpreted as, in inverted commas, a mental deficit attached to this person because they appear not to be conducting themselves in the way that you or I might conduct ourselves. So the labelling that goes on is of concern and, as I said at the beginning, a stereotypical assumption is made. You add that to the fact that there seems to be perhaps in a person with cognitive impairment less likelihood of them being able to give evidence in the court that's likely to carry the judgment of a court or a jury and/or doesn't in the first instance give police, given the current set of arrangements, an adequate level of confidence as they would see it to take something forward with a view of success, all of these things impact on and in effect result in denial of access to justice by people with a disability. Those are the realties, in our view.

Those are the sorts of broad things we would say. I invite my colleagues to say some more, which may be helpful for you, or we will answer anything you ask of us, obviously.

Mr CARBINES — Chair, if I could. Mr Harkin, when you talked in the submission around rights awareness education, have you seen examples where perhaps some initiatives have worked well that need to be strengthened or ways in which — is it around SRSs, is it about the people who are providing the care also being able to provide those examples, or that education around people's rights, or does it need to be done by others? Have you seen any examples where perhaps it's worked well that needs further strengthening or could be adapted further?

Mr HARKIN — I would have thought that there are not an insignificant number of examples where rights, affirmation training, for want of putting it in a more useful way, are delivered but one senses that the prospect of it being more successful and more appreciated is enhanced by not being provided by people who are also providing the support. For instance, that's something we do — and I'm not saying we should do more, we do what we can with what we have before us. For instance, some parts of the Department of Human Services have funded organisations like VALID, for instance. VALID is the peak organisation of folk who bring an advocacy perspective on behalf of people with intellectual disabilities, training in particular called My Rights Training, which is about giving that right of emphasis and affirmation to people but, again, these things are good ideas that see funding and then don't quite go on. We're not talking about massive investments here, what we're talking about is modest investments that if you're going to sustain these arrangements and keep to the forefront of folks' circumstances, their understanding of their rights, then this needs to be, in my view, ongoing but I don't think it's Herculean in terms of investment, it's modest. So there are a number of examples.

We're also fortunate to have a reasonable appreciation of contemporary issues in the UK in particular, and there's been some notable and regrettable recent developments of mistreatment by folk living in residential circumstances where in one place the whole of the staff were suspended and are now variously being prosecuted for the way that they treated people, and you can see in a very short video people being dragged from their beds and variously slapped about and when they were on the floor, kicked in order that they might get up and be more compliant with the requirements of the staff. This is no way to be treating people in 2011 and we can point to regrettable treatment of people in this state in a range of circumstances that, by most measures, people would regard as disturbing and completely unforgivable essentially and about which as a community we probably would have a sense of shame.

Ms GARRETT — In terms of the issue of stereotypes and credible evidence and credible witnesses, which seems to be a major issue, what do you think would be most effective regarding addressing that issue and do the courts and judiciary have a role in breaking down some of those stereotypes?

Mr HARKIN — I would have thought so. I don't have a sense of whether or not it is the judicial college that's concerned with the education of the judiciary but it would be a really interesting question, it seems to me, to ask the extent to which an issue like this would have been considered by the judicial college when seeking to educate the judiciary about such things, and whether the college also encompasses the various levels of the judiciary. My sense is it probably does, and in which case why wouldn't you reasonably expect them to understand that you can have these issues of sensitivity highlighted to them in the same way as I think the current sets of arrangements in terms of supporting education and police are inadequate. It's not a criticism, it's merely an observation of how it works.

Mr NORTHE — Just in terms of what you were saying before, the model is already in place but it's probably not being adhered to as it might well be, and along with that comes from the training and so forth, how do we train the police, but how do you actually consolidate that to make sure that it actually is followed? Is there anything else other than training that you would do on both sides of the fence, if you like, to ensure that it is encapsulated and you can strengthen it into the future so we're not missing people?

Mr HARKIN — Lynne, do you want to make a comment about that?

Ms COULSON BARR — I guess it's not just training, it's things like timeliness of response so people's ability to recount their stories and to give their evidence will be impacted on with a delay. If you have a system that allows those delays to happen, that can manifest with receiving evidence that they assess is not reliable but if they had been more timely in being able to get the people to give the evidence, that would reinforce the benefits of that timely response.

Mr HARKIN — As I indicated earlier, it also would ameliorate, to the extent that amelioration is achievable, the extent to which people feel trauma as an outcome of their experience. One imagines it's a standing orders kind of thing in terms of behaviours that require actions to be taken within a specified period of time.

Mr NORTHE — How do you enshrine it further so people are adhering to the model?

Ms COULSON BARR — I think it's about police particularly being aware of the impact of any delay on people's capacity to give evidence and recount their stories and also their awareness of how people can be assisted by having a range of communication aids. I think part of the issue is that police may not be asking the questions that they need to ask of staff in terms of how does this person normally communicate? Have they got a communication book that they used when they told you the story? How did they tell it? We've seen evidence with incident reports where there's been a really clear account of an incident where a resident has been able to point to a picture of who the alleged perpetrator is, has been able to recount what's happened, now if those things aren't replicated when they speak to the police the chances are the police aren't going to hear the same evidence, so it's about police being aware of not just the processes but what the information they need to ask is. And similarly with Independent Third Persons, they're very variable in their knowledge of what type of assistance a person might need.

We also find that staff aren't often clear about what their role is, like how much information they should be volunteering to the police, particularly if they're employed by an employer where the alleged perpetrator is a colleague, I think it's more up to the police to be asking the questions about what information they need to be able to assist the person to provide the evidence. The location of where the interview is is important too because we're aware of people who have been refusing to get out of cars at the police station because they're fearful, so it's about having that conversation: what's the best way going to be for this person to be able to give evidence?

The CHAIR — Is there a system in place, such as a card or something, that intellectually disabled people can carry to hand to the policeman or somebody who may be approaching them and having trouble communicating? Is that used at all?

Mr HARKIN — No. For instance, like somebody who has epilepsy or diabetes?

The CHAIR — Yes.

Mr HARKIN — No.

The CHAIR — Do you think that would be something that may have — —

Mr HARKIN — It's not an unworthy suggestion. The question is to appreciate that the breadth of people's circumstances is so broad and people's reactions are so different and sometimes people think the description of folks' behaviour as behaviours of concern is a euphemism. It's not a euphemism, it's a polite way of describing somebody's behaviours that may be difficult, in inverted commas, from our perspective. You just think for a moment, if I may suggest what Lynne was saying, it's the points that lead up to the engagement with the justice system that are of equal criticality. If appropriate, timely and thought through responses are not how you would characterise the point of engagement with the justice system, the prospect of going anywhere is already diminished in terms of achieving any particular outcome that might be regarded generally as to the good. And then to add to that, you've now introduced somebody with a significantly limited capability into a system that's simply not designed to accommodate their circumstances.

I notice in the folk that spoke to you previously, in the submissions that were made assertions were put and people variously point out issues of sexual crimes or allegations of sexual crimes, and they're not processed because they simply can't be believed. It's not so much that they can't be believed, it's that there are not arrangements and sets of definitions and responses in place to allow those circumstances to be unpacked and processed adequately and fairly.

Mr CARBINES — Chair, could I ask a couple of questions. The first one probably relates to obviously, as we understand your office's role around brokering and dealing with issues that are raised with disability service providers, going back to what you talked about earlier in terms of Victoria Police, does Victoria Police engage or seek the views of your office in relation to any criminal justice matters, or is that something that's more done through the Office of the Public Advocate or others? This probably leads to where my next question is going, but is there a role for your office? I'm just trying to get a sense of that aspect.

Mr HARKIN — There's a protocol in place between Victoria Police and the Public Advocate. There's a protocol in place between Victoria Police and the Department of Human Services which, as I have suggested in my commentary so far, operates variably. We don't have a protocol in place with the Victoria Police. I've spoken informally to the former Chief Commissioner of Police and to one of the Deputy Chief Commissioners of Police about these matters more generally. I guess we could make a contribution around sensitivity and the education efforts that they might undertake, but I think without a set of standing order requirements about you must behave in these ways within these timeframes and make sure that these sets of considerations are exercised in processing of anybody, not much will change. I think the extent to which you leave some of these sorts of folks' circumstances to discretion is not to the advantage of people with a cognitive impairment and if the driver is to ensure an outcome in terms of accessibility to justice that is equitable, fair and reasonable for every possible circumstance, can you deliver every possible circumstance? Probably not but I'm pretty sure we could go as a society a bit further than we've got.

Mr CARBINES — Perhaps does that get to where your office might advocate or try to resolve matters on behalf of someone with an intellectual disability with someone who is looking after them or providing a service to them, potentially where there might be police involvement or sometimes those timelines around that you're able to advocate for, or trying to make sure they're being met on behalf of a person with a disability, is that the sort of thing?

Mr HARKIN — Well, no. The Act limits my ability to deal with issues when they're under the current consideration of another board or court or other like body, and police would be in such a category, so I would be required by the Act to not continue dealing with something. One of the first questions, however, we would ask when we are alerted to an issue that involves an allegation of assault, sexual or otherwise, is: before we decide we're not able to deal with it because we've discovered that reality, is has it been referred to the police? And if not, why not? Because there's a fundamental question if the answer is no, not yet, there's something amiss on the part of those folk who have responsibility and duty of care at law for the well-being of people.

Mr CARBINES — Chair, can I ask. Do you find then it's people who come directly to your office who have a disability or members of their family?

Mr HARKIN — You mean more generally?

Mr CARBINES — Yes. That then might still relate to where people might feel an injustice has been done, how are they coming to you?

Mr HARKIN — I can talk to that. It's increasingly the case that sources of referral to us are people with disabilities themselves; it's running at about 25 per cent of all sources of referrals to us are people with disabilities themselves. Typically people with disabilities come to us because they're uncertain about where they should go and/or are afraid. I think it's regrettable to understate it, that people feel afraid, that they can't raise the issues of concern they have with the people that they have a concern about. It's usually because the dimension of dependency that exists around the support arrangements that are provided and so folk are influenced to — I don't want to poison the relationship, I rely on this person, or that organisation, to provide the kinds of supports to enable me to live my life on a daily basis, and I don't want to complain about them because I would like to have a good relationship with them. So that's fear and it often manifests itself in those ways. If you think about folk in the community more generally, to use a comparison between what I do and what the Health Services Commissioner does, the average person will go to the Health Services Commissioner with an issue of concern that's generally episodic in character, there's a prospect that there will be a consensus that will be able to be achieved through some conciliative process that my colleague at the Health Services Commissioner might deliver, and that's the end of the issue, the relationship is episodic. This is the big difference with people with disabilities, invariably you would more accurately characterise the relationship with a person with a disability has with their provider as lifelong and that makes one heck of a difference in the dynamic that unfolds in folks' lives and, of course, for the service provider who have arguably a deeper responsibility.

Mr CARBINES — Lastly on that, perhaps encouraging in a way that people with disabilities are seeking out advocacy or support from your office, how do you think they're coming to decisions to come to your office, is that through awareness?

Mr HARKIN — Yes, it is the result of awareness campaigns. One of the things that I'd observe is, unlike the Health Services Commissioner who has been in business for 20 years, we've been in business since 2007 when this Act became operational, and we started with a blank piece of paper but I had the view that we needed to be clear about the education mandate that the Act requires me to deliver around the affirmation of people's rights. So we adopted the motto, if you like, of "It's Okay to Complain". Not please complain, hurry up and complain, we're here to insight you to be a truckload more unhappy than you presently are, not those things at all but rather: it's okay to say what you want to say about your circumstances. It's a gentle but firm approach and we've pursued this as a theme in the education effort that we've conducted with service providers across the state, and to people with disabilities, and to advocacy organisations, and to families and other significant people in the lives of people with disabilities. Then, of course, people talk to one other. We visit services, I've been to more than I can count and I have talked to people, that's the way of creating in the minds of the disability sector more broadly there's somewhere else you can go, it's actually somewhere, whereas before there was nowhere in particular.

Whilst all of this contributes, I'd argue that the model that I've just fairly and formally described has equal application to the circumstances that I suggested might apply earlier in my submissions around police, etcetera, and the extent to which there might be a concerted education effort. I also would repeat it would be underestimating significantly the value of these modest investments around the training like 'My Rights' training for people with disabilities; it's unsophisticated, it's packaged simply; it uses plain English and that's what we do as well, we produce all sorts of material in a language that some might regard as esoteric, on the other hand we produce messages in plain English for the very purpose of making sure that we connect with people in a way that's meaningful for them as distinct from satisfying for me. As it happens, it is satisfying for me to know that I've connected with them, and the testimony for this is that we ask them as distinct from I will tell you what I think but I would rather hear what they say.

Ms COULSON BARR — We find the most impactful training is that delivered by people with disabilities. We co-present with the person with a disability, with an intellectual disability, if that's the group we are speaking to, and there's lots of research that shows how impactful that is in terms of delivering to people with a disability so involving people with a disability, training other sectors like the police. If you're looking at trying to address stereotypical responses, the best way of doing that is having someone with a disability to speak to.

The CHAIR — All right. Thank you very much for coming in today. Very helpful.

Mr HARKIN — Not at all. I wish you well.

The CHAIR — Thank you.

Witnesses withdrew.